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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-714

DAVID T. DELLINGER, ABBOTT H. HOFFMAN, JERRY C. RUBIN, and WILLIAM M. KUNSTLER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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I. THE ELECTRONIC SURVEILLANCE ISSUE

Concededly, the issue whether Alderman v. United States, 394 U.S. 165 (1969), is applicable to a direct contempt case is an important question never heretofore passed upon by the Court.

Petitioners contend in their petition that the Seventh Circuit's opinion is

written as if Alderman had never been decided. The government's response is simply to ignore the real electronic surveillance issues in this case as well as the state of the record.

A.

Petitioners' contention is that throughout the original trial before Judge Hoffman, situations were created by the government*/ which had the effect of goading the parties on the defense side into responses for which they could be charged with contempt.

The record in the original trial strongly indicates that the government sought to buttress its thesis that the defendants were the offenders in Chicago in 1968, and not, as they claimed, the

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*/ It was not until November of 1972 that the Circuit Court in its lengthy opinion finally made clear that the government's action at the trial constituted gross misconduct. United States v. Dellinger, 472 F.2nd. 340, 389-391.

victims of a police riot, by pointing to the conduct of defendants in court which the government had itself induced.*/ It is the petitioners' contention that this goading of the defendants was based upon a close monitoring through electronic surveillance of their own phones, those of their attorneys, and those of their staff to ascertain their activities and moods so that the government would know exactly what stimuli to apply and when.**/

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*/ The government in support of the conspiracy indictment charged the defendants with being "violent anarchists" (Tr.21334) and tried repeatedly to transfer the conspiracy to the courtroom: If the jury believed that the defense was attempting to disrupt the trial, it would be easy for it to believe that the defendants had conspired to disrupt the 1968 convention. In its summation, the government tried to join together these so-called conspiracies in the minds of the jurors: "You know the other assault they made in this courtroom is an assault on the law itself." (Tr. 21327).

**/ Such a program by the government is entirely consistent with the disclosures of a few months ago of the FBI's counter-intelligence program and how it functioned so as to stimulate res-

(fn. cont. next page)

The government simply ignores this entire contention. It merely repeats - despite the clear contrary indications in the record - that "the transcript...could not have been derived from or tainted by unlawful electronic surveillance," claiming, therefore, that Alderman is inapplicable.

(fn. cont. from preceding page)
ponses within allegedly radical organizations; the even more recent disclosure of the surreptitious mailing by the FBI to Mrs. Martin Luther King of a tape recording purportedly made of her husband's activities in the hope of inducing some reaction from him; and the cascading revelations of seamy infiltration activities by the CIA.

Beyond that, however, petitioners discovered through disclosures made by the government in the civil suit brought by them in the United States District Court for the District of Columbia, in which they are seeking damages for electronic surveillance, Dellinger v. Mitchell, No.17-68-69, that an important part of the electronic surveillance program was the determination of the "mood" of particular individuals. Those disclosures were filed with the Circuit Court and are consistent with the emerging knowledge the American people are acquiring, that much of the "intelligence" programs concerns itself with gathering information about the personal lives of objects of governmental surveillance, especially political dissidents, for such use as government agents seek to make.

But the trial transcript is not a document which emerged out of nowhere; it is rather, in petitioners' view, the most likely fruit of the government's electronic surveillance program, and accordingly, this is precisely the kind of case requiring the revelation of electronic surveillance to petitioners so that they may demonstrate taint. If through unlawful electronic surveillance the government knew how to fashion, time, and direct its provocations so as to have the maximum effect in triggering responses from the defendants, then the transcript is certainly the fruit of electronic surveillance. And if those responses of the defendants are the basis of contempt prosecutions, then how can it be said that Alderman does not mandate the disclosure of such unlawful electronic surveillance?

B.

Aside from petitioners' contentions that the entire transcript reflects responses to well-calculated provocations, a detailed study of contempt citation VI against William Kunstler, strongly suggests that electronic surveillance was most likely a vital factor in the evolution of that charge.

It will be recalled that this citation arose out of Mr. Kunstler's having ascertained over the weekend of January 31-February 1, 1970, that Dr. Abernathy, long sought as a defense witness, had come back to the country. After the trial before Judge Gignoux, Mr. Kunstler, based precisely upon the procedure suggested by Judge Gignoux, */ pointed out that his know-

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*/ Judge Gignoux had reserved to defendants, 'the right to renew such motions [for disclosure of electronic surveillance] at or after trial upon a showing that the government's evidence had been or

(fn. cont. next page)

ledge of Dr. Abernathy's arrival had been ascertained by telephone calls and the government's monitoring of those calls could have been an explanation for its unusually rigid opposition to permitting Dr. Abernathy's testimony, an opposition that did not vanish until it was too late for Dr. Abernathy to appear.*/ The govern-

(fn. cont. from preceding page)
conceivably could have been tainted by unlawful surveillance." 357 F.Supp. at 962; emphasis supplied. Defendants in their post-trial motion analyzed the specific charges upon which Mr. Kunstler had been found guilty of contempt and pointed out that both arose out of the strange circumstance of Dr. Abernathy's becoming available to testify, that that knowledge was ascertained by the defendants "through members of the defense staff and associates in the courts of telephonic communications which were had on January 21 [sic should be 31] and February 1, 1970; that the Reverend Abernathy's schedule for arrival in court was similarly ascertained" and accordingly it was highly conceivable that "the entire scenario of the government's opposition to the Reverend Abernathy's taking the stand and Judge Hoffman's ruling in respect thereto could have resulted from unlawful surveillance, thereby establishing direct taint of the very substance of the alleged contempt."

*/ See Petition, pp.19-20.

ment could well have learned through electronic surveillance the content of Dr. Abernathy's testimony, including the fact that he would impeach a key government witness and therefore decided to oppose awaiting his arrival from the airport to put him on as a defense witness.

C.

The government continues the effort to confuse a major issue, namely, that it was the overhearings of the defense staff that were critical and that the entire procedure by which the government made in camera presentations to the court resulted in the Seventh Circuit's being completely misled on the facts. We believe the Seventh Circuit may have been led to believe that all electronic surveillance was submitted in camera, when in fact, the government flatly refused to turn over electronic surveillance of the defense staff.

The government's brief before this Court continues the same misleading process. It says that the government made "overhearings available to the court in camera to allow it to verify the government's representation that it possessed no exculpatory material" (government's response, p.6). The government carefully does not mention that it at all times refused to reveal electronic surveillance of the defense staff, either to the defendants or to the court in camera.

Moreover, the government (response, p.5), without any justification therefor, has taken the view that Alderman is in effect limited by Brady v. Maryland, 373 U. S. 83 (1963) to material the government considers exculpatory. We know no justification for such an analysis; Alderman is not limited to exculpatory material and Alderman specifically forbids a pre-turn-

over screening by the government, or even by the court.

II. THE CONTENT OF THE KUNSTLER CONTEMPTS AND THE PROCEDURAL ISSUE AS TO THE CONSISTENCY OF THE CHARGES AND THE CONVICTION WITH RESPECT TO KUNSTLER VII.

Kunstler VI

A major point in our petition was that Kunstler VI must fail because it did not constitute "actual obstruction of justice," the test laid down by this Court in In re McConnell, 370 U.S. 230, 236 (1961). We pointed out in detail that the three-sentence treatment of this issue in the Circuit Court's opinion simply fails to supply the missing element of "obstruction." The jury was not present; there was no reprimand from Judge Hoffman; nor even a direction that Mr. Kunstler stop talking; there was no coarse language; and the Circuit Court found that the trial had long since ceased to be a fair and dispassion-

ate proceeding, United States v. Dellinger, 472 F.2d 340, 385-91 (1972).*/

As the jury, the fact trier, was not present, and as the trial judge had long before demonstrated he was not fair and dispassionate, Mr. Kunstler's remarks late in the trial could not conceivably have prejudiced a "fair and dispassionate proceeding.

The government's response to these arguments is to ignore them. It simply says, without argument or explanation, that it relies on the opinion of the Seventh Circuit (government's response, p. 8).**/

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*/ The Circuit Court found from the record that "the District Judge's deprecatory and often antagonistic attitude toward the defense is evident in the record from the very beginning." United States v. Dellinger, supra, 472 F.2d at 376.

**/ The government quotes from Dobbs, "Contempt of Court, a Survey," 56 Cornell L.Rev. 183, 206 (1971). But its quotation is quite inappropriate. Firstly, Mr. Dobbs was referring to United States v. Schiffer, 351 F.2d 91 (6th Cir. 1965), where the court had been careful to point out that

(fn. cont. next page)

Kunstler VII

In their presentation to this Court, petitioners pointed out an unusual feature of the treatment of Kunstler VII by both the District Court and the Seventh Circuit, namely, their failure to deal with twelve crucial pages of transcript which were included in petitioners' appendix.*/

The government's response to the petition continues this practice of ignoring the record. While the government refers to the matter (government's response, p. 12), there is no straight forward acknow-

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(fn. cont. from preceding page.)
the trial judge "had infinite patience. He did not engage in wrangling or bickering with counsel. He did his utmost to preserve order and decorum." 351 F.2d at 95. On the following page, Mr. Dobbs emphasized that cases such as he was referring to were to be distinguished from situations which "reflect misbehavior by the judge. Sometimes it is behavior that would be regarded as contempt if committed by others. At other times judges provoke irritable responses from attorneys by their own hostility or unprofessional conduct."

*/ These transcript pages occurred between the two parts of Kunstler specification VII but are omitted from the specification.

ledgement of the fact that long before the alleged contempt, there was a colloquy initiated by the judge and in the presence of the jury (quoted in full at p.18 of the petition), as a result of which the jury was wholly and fully appraised of the fact that the defendants had sought to have Dr. Abernathy testify. This followed because of the unneccessary and prejudicial statement by the trial judge that the defendants "have no further evidence to present" (petition, p.18).

On the matter of the procedural aspects of Kunstler VII, the government suggests that there is only a semantic difference between the charge made and the charge of which Mr. Kusntler was convicted.

But, as pointed out in the petition, the difference rather than being semantic was critical. The District Court and the Circuit Court have simply failed to read

the transcript with care and to recognize that Mr. Kunstler as a lawyer, was listening to the precise words of the court's order, and did not violate them.

Mr. Kunstler was actually convicted of making an application to the court to permit the Reverend Abernathy to testify. Had the court made an order not to mention the name of Rev. Abernathy before the jury, that would have been another matter. But the court never made such an order and Mr. Kunstler knew it. The only order of the court was not to mention "that they wanted Dr. Abernathy to testify."

Mr. Kunstler in good faith believed that making an application to the court "to reconsider to put him on the stand as a witness for the defense" (85a) was not a violation of the court's order.

Whether this was or was not a violation is not a matter of semantic difference

but a question of fundamental procedural due process; he was charged with violating an order that in fact was not made.

In its response (p.12), the government, as did the Seventh Circuit, suggests that Mr. Kunstler could be found guilty of contempt "for his persistence in arguing the motion over the judge's repeated orders to stop." But there is not a word in the charges made by Judge Hoffman, and on which Mr. Kunstler was tried, suggesting that persistence in arguing was intended to be part of the content of specification VII and an issue against which he had to defend. The entire thrust of the charge and the trial before Judge Gignoux was whether he had violated a court order in bringing matters to the jury's attention, not whether he had been overly persistent. This procedure of deciding after a trial that a defendant "could have" been charged

with something of which he was not charged is of the essence of the denial of due process. Eaton v. Tulsa, 415 U.S. 697 (1974); Cole v. Arkansas, 333 U.S. 196 (1948).

III. THE INTENT ISSUE.

The government argues that there is no "conflict between the circuits on the correct standard of intent" (government's response, p.10).

But the Seventh Circuit, which ruled on this question, found such conflict. It expressly said: "Taking the element of intent first, it should be observed initially that this requirement has received a variety of treatment in different courts." United States v. Seale, 461 F.2d 345, 367 (1972). It then proceeded to analyze the cases referred to by the government and expressly reject the standard employed in the District Court for the District of

Columbia. The Seventh Circuit found conflict among the circuits, not only on the question whether there is a requirement of intent but also how "the requisite intent is defined," id. at 368. And again, the Seventh Circuit charts its course through a maze of conflicting federal circuit court decisions on the issue of the quality of intent required.

If the Seventh Circuit is of the view that there is a conflict of the circuits on both the existence of a requirement of intent and the definition of such a requirement, then we consider that it is settled that there is in fact a conflict among the circuits. The government's bland denial of the existence of such a conflict will hardly furnish what the federal judiciary and the bar as a whole are entitled to, namely, a clear expression of a uniform standard of the intent require-

ment of contempt.*/

IV. THE ISSUE OF DISCRIMINATORY PROSECUTION.

The government erroneously states that "all petitioners contend that their convictions were unconstitutionally discriminatory" (government's response, p. 13). The petition for certiorari makes clear that the question of discriminatory prosecution is raised as to the petitioner Kunstler alone (see Question No.5, p.3).

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*/ The government's suggestion that all this is irrelevant because of Judge Gignoux found "that Kunstler himself knew that his conduct was wrongful" (government's response,p.9) misses the point. Firstly, Judge Gignoux was merely referring to the content of the specification, not the evidence at the remand trial before him, where Mr. Kunstler without contradiction testified that he did not intend to be contemptuous and that his statement in the specification referred merely to a prediction that Judge Hoffman would hold him in contempt and was not an acknowledgement that he believed his conduct wrongful.

In any event, since Judge Gignoux may have followed an inappropriate standard of intent, it is not possible to determine upon what basis he rendered his decision. Eaton v. Tulsa, 415 U.S. 697 (1974).

The government's error on this point reveals a failure to note the significance of the issue. This is a matter of discrimination between two classes of lawyers - government lawyers and defense lawyers.

But this is not the only misconception of the issue by the government. The government argues that the prosecution was justified because the Circuit Court, despite its finding of misconduct by the judge and prosecutor, had expressly declined to dismiss the charges against the petitioners on the grounds of judicial and prosecutorial misconduct (government's response, pp.13-14).

The government has inverted the time sequence of the two Seventh Circuit decisions. When the Seventh Circuit declined to dismiss contempt charges against the petitioners, 461 F.2d 389 (1972), it had not as yet made its findings of judicial

and prosecutorial misconduct. That did not come until six months later when it decided the substantive case, 472 F.2d 340 (1972).

Secondly, the government seeks to paint the picture that it was merely acting on the direction of the court. But the facts are quite the contrary. The government had no compunctions about dropping the Bobby G. Seale contempt case when it was required to disclose its illegal electronic surveillance logs (see petition, p.52, fn.1). Nor did it have any doubt of its power not to proceed with respect to 89 of the contempt specifications which it chose to drop (government's response, p.3). Indeed, two days before the trial before Judge Gignoux there was a conference in Washington at the Department of Justice on whether or not to proceed with this case (petition, p.9, fn.8). Obviously, the

government had to power to drop the charges if, as, and when it chose.

Thus, the government's reasons seeking to avoid responsibility for the discriminatory prosecution in this case are spurious. We have here an unvarnished, naked determination by government prosecutors to proceed against defense lawyers because they are defense lawyers, while adhering to the view that their own colleague prosecutors should not be prosecuted for their "contumacious conduct."

CONCLUSION

The government ends its response with a quotation from the last paragraph of the Seventh Circuit's opinion, as follows: "To insure continuing respect for the judicial system, it was necessary to try the defendants for the overwhelming misconduct they demonstrated at the conspiracy trial." (Emphasis added.)

Since in the case of Mr. Kunstler, the two specifications occurred on one day in the last two weeks of a four and a half month trial, the circuit must have been referring to specifications of which he was acquitted, or which the government chose not to prosecute, or to the conduct of others. Such a statement harks back to the panic which this case originally generated, but which subsequent study revealed to be unfounded.*/

The American system of justice requires that defendants be convicted only on specific charges and not for general reputation, items not charged, or the conduct of others. This is indeed the essence of due process of law. "Respect for the

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*/ See, Preface and Report of the Special Committee on Courtroom Conduct of the Association of the Bar of the City of New York, Disorder in the Court.

judicial system" would flow from a forth-right adherence to that principle.

Respectfully submitted,

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